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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/806,243	06/22/2001	Johannes Schlebusch	10035.00	4928

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EXAMINER	
SAYALA, CHHAYA D	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 12/01/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/806,243	SCHLEBUSCH ET AL.	
	Examiner	Art Unit	
	C. SAYALA	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *07 September 2004*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-4 and 6-20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-4 and 6-20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *26 March 2004 and 17 September 2001* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

1. Claims 1-4, 6-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 1, lines 8-11, applicant claims "water-binding" elements to be a selection from 3 groups or a combination thereof. But in view of the amendment to this claim and the inclusion of the new limitation reciting the presence, in the final product, of the flour, starch, waxy maize, silicas, physiologically unobjectionable metal oxides, non-toxic inerts, water-binding substances **and** cellulose powder/vegetable fibers, the recitation at lines 8-11 is redundant and render the claim indefinite because there is no selection to be made, since the claim now requires that all the elements at lines 13-16 be present in the final product.

In claim 1, line 13, applicant recites a content of proteins and water-binding components in an amount 10-35% and yet in the last line, the claim repeats the water-binding substances. Is this the same water-binding component of line 13 and is the amount the same?

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

3. Claims 1-4, 6-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 97/02670 in view of Lee (US Patent 5456933) and Berry et al. (US Patent 4031267).

'670 teaches a chunk product that consists of blood proteins, egg solids and vegetable proteins such as wheat flour, gluten and soy meal, less than about 20 wt %. The protein content is 10-22% wt. See page 5 and particularly lines 9-10 and 13, 19-20. The fat content is given as between 5-25% wt. See page 6, line 9. Note that the patent also teaches "However the amount of fat is not an important parameter....and the amount can be selected as desired. Consequently, no fat need be added". And "Reducing the importance of fat as a parameter in the process is a major advantage of the process. Thus it would have been obvious to one of ordinary skill in the art, that even though the amount of fat is at 5%, to reduce it as suggested by the reference itself, would be advantageous. The ratio of protein to starch is not given per se, but it would be obvious to fathom such from the amounts given for individual ingredients. The amount of water is disclosed as 45-85%, at line 35, page 5. Claims 9-12 recite limitations relating to the appearance of the product. In this regard, the patent states

that the reference product is moist, stable to canning procedures and is chewy and has a meat-like appearance. The office is not equipped to manufacture prior art products and compare them with what is claimed, and it would have been obvious to one of ordinary skill in the art at the time the invention was made that this reference description reads on being "deformation-resistant" to outside touch. As for the process claims, the patent teaches a mixture of proteins, which includes a mixture of flour being denatured by alkali, and the temperature being raised to 100^0C plus to coagulate it (page 6, lines 20+ to page 7, line 35). Note that at page 5, line 30, the addition of salt is disclosed. The product is in chunks and has a striated appearance resembling meat. The texture is said to be chewy. The patent does not teach the silica or the metal oxides, fillers or water-binding substances or cellulosic fibers or that the chunks are shaped as strands.

Lee teaches a similar product, a uniform, "cohesive shaped piece which maintains its distinctive definitive shape upon hydration and retort", which contains soy or wheat gluten and starch from cereal flours. Col. 5. The patent teaches that the product contains 15-65% starch from cereal flours. A fat source is also included and is in a range, 0-9 wt%, within the claimed range of less than 5%. The ratio of protein to starch can be fathomed from the various amounts at Table I. At col. 4, lines 16-30 and col. 5, lines 59-65, the patent states that the exact amounts of protein, carbohydrate and fat can be selected from the amounts given (that already include the ranges claimed herein), depending on the specific type of ingredient, and determining the amount of ingredient needed to achieve the necessary concentration in the ranges specified in Table I. Even though the patent shows a variety of ratios of protein and starch at Table

I, it would have been obvious to one of ordinary skill in the art to fathom amounts within the ranges/amounts shown to achieve the type of uniform, "cohesive shaped piece which maintains its distinctive definitive shape upon hydration and retort", as needed. Claims 9-12 recite limitations relating to the appearance of the product. In this regard, the patent states that the reference product is spongy to the touch and chew. See col. 3, lines 5-10. The office is not equipped to manufacture prior art products and compare them with what is claimed, and it would have been obvious to one of ordinary skill in the art at the time the invention was made that the reference description of being spongy reads on being "deformation-resistant" to outside touch. In addition, Lee teaches fiber in the product, in an amount of 1-30%. See col. 6, line 65 to col. 7, line 5. Note that the extrudate is cut into bite size pieces or kibbles. See examples.

Berry et al. is drawn to an expanded protein product that uses fillers to reinforce the protein (col. 3, lines 41-43). The proteins are the same (col. 3, lines 5-15) and fillers such as silicon dioxide, or cellulose fiber (col. 3, lines 45-70) are added. The degree of expansion and texturization of the proteinaceous material is affected by the choice and amount of filler. The filler is used in an amount 1-15%. Col. 4. Note the use of soy flour at col. 4, line 48. See example 1. The extrusion is in the form of ropes. Thus this reference teaches the advantage of using fillers.

Because all these patents teach similar products with similar ingredients, then it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the fiber of Lee and the fillers of Berry et al. in the product of the WO patent for the advantages shown by the secondary references as discussed above.

To extrude the product into strands or ropes would have been a matter of choice since such shapes were already disclosed by prior art at the time the invention was made, as well as the production of bite size kibbles.

Response to Arguments

Applicant's arguments filed 9/7/04 have been fully considered but they are not persuasive.

On page 5, last paragraph, applicant states that "No single prior art reference provides all of these ranges in one reference and the Examiner has impermissibly selected various components from the various recipes of the prior art to arrive at a conclusion of unpatentability." Only three references were used, all drawn to the same endeavour. The primary reference teaches most of teh components of teh secondary references. Each of the components pointed out to from the secondary references was a selection made not one of opportunity, to satisfy applicant's claims, but because each selection was qualified by a benefit shown by the reference themselves. Furthermore, the amount of each component was shown by the references. Applicant's position that no single reference shows all these ranges, leaves no room for a rejection under 35 USC 103, provided by law. This rejection has been made under 35 USC 103 and applicant's arguments are not persuasive of error.

On page 6, applicant states that the sentence at page 6, lines 5 and 6 of the WO patent pertains to prior art references disclosed therein. This is in fact correct. Both references are incorporated by reference by the WO patent. Applicant states that the

sentence "Consequently no fat need be added, particularly the animal protein source 2conatins fats", refers to the references. This is incorrect. However, applicant is correct in noting that no fat need be added because the amount of fat in the emulsion (protein source 2) is 5% and above. Even though the WO patent teaches 5% fat as the lower limit, the Lee patent teaches a fat content of 0-9% and this rejection is under 35 USC 103. One who is skilled in the art and combines the reference teachings as applied would know how to optimize between the ranges taught, particularly when the WO patent states "Reducing the importance of fat as a parameter in the process is a major advantage of the process". (WO patent, page 6, first full paragraph, last sentence).

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. SAYALA at Group 1761, telephone number (703) 308-3035.

The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3599.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is 703-308-0661.

C. SAYALA
Primary Examiner
Group 1700.